United States Court of Appeals

for the Second Circuit

APPENDIX

74-2304

United States Court of Appeals

SECOND CIRCUIT

Docket No. 74-2304

RONALD LANDON,

Plaintiff,

—against—

LIEF HOEGH AND CO., INC.,

Defendant.

A/S ARCADIA,

Defendant and "Plaintiff" Seeking Joinder-Appellant,

—against—

GULF INSURANCE COMPANY,

Plaintiff or Defendant or Involuntary Plaintiff-Appellee.

JOINT APPENDIX

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendant-Appellant

J. WARD O'NEILL
JOSEPH T. STEARNS
RICHARD A. CORWIN
Of Counsel

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

Relevant Docket Entries

Date Filed	
August 16, 1973	Complaint (with jury demand) of Ronald Landon.
April 4, 1974	Answer of A/S Arcadia, sued as Lief Hoegh & Co., Inc., to Complaint.
May 29, 1974	Motion and supporting Affidavit and Memorandum of Law of A/S Arcadia to join Gulf Insurance Company as a plaintiff and to implead Pittston Stevedoring Corp. as a third-party defendant.
June 17, 1974	Order dated June 14, 1974 of Hon. John F. Dooling.
June 20, 1974	Rule 19 complaint of A/S Arcadia joining Gulf Insurance Co. as plaintiff, defendant or involuntary plaintiff.
August 16, 1974	Answer of Gulf Insurance Co. to third-party complaint and counterclaims of Gulf Insurance Co.
August 23, 1974	Motion, with supporting Affidavit and Memorandum of Law, of A/S Arcadia to strike affirmative defense or Gulf Insurance Co.
September 4, 1974	Reply of A/S Arcadia to counterclaim of Gulf Insurance Co.
September 24, 1974	Motion of Gulf Insurance Co. to dismiss the "complaint" of A/S Arcadia against Gulf Insurance Co.

Relevant Docket Entries

Date Filed	
October 11, 1974	Memorandum and Order of Hon. John F. Dooling dated October 10, 1974 directing Clerk to enter judgment that defendant "plaintiff" A/S Arcadia take nothing as against plaintiff or defendant or involuntary plaintiff Gulf Insurance Company and that complaint-over Rule 19(a) and the claims therein set forth are dismissed.
October 23, 1974	Judgment dated October 23, 1974 dismissing the "complaint" filed.
October 25, 1974	Notice of Appeal filed by A/S Arcadia.

Complaint

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

RONALD LANDON,

Plaintiff,

—against—

LIEF HOEGH AND CO., INC.,

Defendant.

PLAINTIFF DEMANDS TRIAL BY JURY

Plaintiff, complaining of the defendant, by his attorneys, KALMANSON & KLAPPER, respectfully shows to the Court and alleges, upon information and belief:

FIRST: That at all times hereinafter mentioned, the plaintiff was and still is a resident of and citizen of the State of New York.

SECOND: That at all times hereinafter mentioned, the defendant was and still is a corporation duly organized and existing by, under and pursuant to the laws of the Kingdom of Norway, or is a corporation duly organized and existing by, under and by virtue of the laws of one of the States of the United States, other than the State of New York or of some other foreign Country.

THIRD: That at all times hereinafter mentioned, the defendant maintained and still maintains an office and place of business in the State of New York, County of New York.

FOURTH: That at all times hereinafter mentioned, the defendant transacted and still transacts business within the State of New York.

FIFTH: That diversity of citizenship exists between the parties hereto.

SIXTH: That the matter in controversy exceeds exclusive of interests, costs and disbursements the sum of TEN THOUSAND ($10,000.00) DOLLARS.

SEVENTH: That this Honorable Court has Jurisdiction of the controversy between the parties hereto.

EIGHTH: That at all times hereinafter mentioned, the defendant owned a certain vessel known as the HOEGH OPEL.

NINTH: That at all times hereinafter mentioned, the defendant was the bareboat charterer of that certain vessel known as the HOEGH OPEL.

TENTH: That at all times hereinafter mentioned, the defendant was the employer of the master, officers and members of crew of the vessel aforesaid.

ELEVENTH: That at all times hereinafter mentioned, the defendant had possession of the vessel aforesaid.

TWELFTH: That at all times hereinafter mentioned, the defendant operated and had charge and control of the vessel aforesaid.

THIRTEENTH: That on or about the 7th day of February, 1973, and for a period of time prior thereto, the

vessel aforesaid, was moored in navigable waters at Pier 19, Staten Island, New York.

FOURTEENTH: That prior to the 7th day of February, 1973, the defendant entered into an agreement and/or contract with one PITTSTON STEVEDORING CORP., relative to the loading and discharging of cargo aboard the vessel aforesaid.

FIFTEENTH: That at all times hereinafter mentioned, the defendant authorized, permitted, allowed and invited employees of the said PITTSTON STEVEDORING CORP., including the plaintiff herein, to do and perform certain work aboard the vessel aforesaid.

SIXTEENTH: That at all times hereinafter mentioned, the plaintiff was a business visitor aboard the vessel aforesaid.

SEVENTEENTH: That on or about the 7th day of February, 1973, the plaintiff was lawfully aboard the vessel aforesaid, in the capacity of a longshoreman, in the employ of the said PITTSTON STEVEDORING CORP.

EIGHTEENTH: That on or about the 7th day of February, 1973, the plaintiff, while aboard the vessel aforesaid, in furtherance of his duties, was caused to be precipitated and to fall.

NINETEENTH: That as a result thereof, the plaintiff was injured.

TWENTIETH: That the said accident and the injuries resulting therefrom were caused through and by reason of the negligence and carelessness of the defendant, without

any negligence or carelessness on the part of the plaintiff in any way contributing thereto.

TWENTY-FIRST: That the said accident and the injuries resulting therefrom, were caused solely through and by reason of the negligence and carelessness of the defendant, in the ownership, operation, management, maintenance and control of the vessel aforesaid; in carelessly and negligently and knowingly and/or for a long and/or unreasonable length of time, causing and permitting the vessel aforesaid, and in particular its deck, to become and to remain in a defective, dangerous, slippery, trap-like and unsafe condition, and to contain thereon, accumlations of foreign matter, and snow and ice; in carelessly and negligently and knowingly and/or for a long and/or unreasonable length of time, causing and permitting the deck of the afore-described vessel to become and to remain in a condition above-described, at a time when the defendant, its agents, servants and/or employees knew, or in the exercise of reasonable care and caution could and should have known, that the deck in its then condition was likely to and would result in injury to those lawfully making use thereof, including this plaintiff; in negligently and carelessly and knowingly and/or for a long and/or unreasonable length of time, failing and omitting to provide the plaintiff herein with a safe and proper place in which to work; in carelessly and negligently and knowingly and/or for a long and/or unreasonable length of time, causing and permitting the deck aforesaid to become and to remain in the condition above-described and for such a long period of time, so as to constitute the same in its then condition a menace and a nuisance; in carelessly and negligently and knowingly and/or for a long and/or unreasonable length of time, causing and permitting the deck aforesaid to become and to remain in a defective and slip-

pery condition; in causing and permitting improper and unskillful cleaning of the deck; in failing and omitting to warn or give notice to the plaintiff of the dangerous and hazards existing thereat; and the defendant, was otherwise reckless, careless and negligent in failing and omitting to take prompt, proper and suitable precautions for the plaintiff's safety.

TWENTY-SECOND: That by reason of the foregoing, the plaintiff was rendered sick, sore, lame and disabled and his injuries are of a permanent nature and character; that by reason thereof, the plaintiff was incapacitated from pursuing his usual tasks and duties and he will in the future be incapacitated from pursuing his usual tasks and duties and the plaintiff has become obligated and will in the future become obligated for medicines, medical care, aid and attention in an effort to alleviate his pain and suffering.

TWENTY-THIRD: That by reason of the foregoing, the plaintiff has been damaged in the sum of FIFTY THOUSAND ($50,000.00) DOLLARS.

WHEREFORE, the plaintiff demands judgment against the defendant, above-named, in the sum of FIFTY THOUSAND ($50,000.00) DOLLARS, together with the interests, costs and disbursements of this Action.

KALMANSON & KLAPPER
Attorneys for Plaintiff
Office & P.O. Address
225 Broadway
New York, N. Y. 10007
RE 2-5340

By: .....

Answer to Complaint

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

Defendant, A/S Arcadia, sued herein as Lief Hoegh and Co., Inc., by its attorneys, Haight, Gardner, Poor & Havens, answering the complaint of the plaintiff respectfully alleges upon information and belief as follows:

FIRST: Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraphs FIRST, FIFTH, SEVENTH, SIXTEENTH and SEVENTEENTH of the complaint.

SECOND: Admits that defendant was and still is a foreign business entity organized and existing under and by virtue of the laws of the Kingdom of Norway, but except as so specifically admitted, denies each and every allegation contained in paragraph SECOND of the complaint.

THIRD: Admits the allegations contained in paragraphs EIGHTH, TENTH, THIRTEENTH and FOURTEENTH of the complaint.

FOURTH: Admits that at the times mentioned in the complaint defendant had possession of the m/s Hoegh Opal and operated, had charge of and controlled the vessel, but not those parts or portions thereof, including her gear, equipment, appurtenances and appliances turned over to stevedores, longshoremen or other independent contractors, but except as so specifically admitted herein, denies each and

every other allegation contained in paragraphs ELEVENTH and TWELFTH of the complaint.

FIFTH: Admits that at the times mentioned in the complaint defendant authorized, permitted, allowed and invited employees of Pittston Stevedoring Corp. to do and perform certain work aboard the vessel but except as so specifically admitted herein, denies knowledge or information sufficient to form a belief as to each and every other allegation contained in paragraph FIFTEENTH of the complaint.

SIXTH: Denies the allegations contained in paragraphs THIRD, FOURTH, SIXTH, NINTH, EIGHTEENTH, NINETEENTH, TWENTIETH, TWENTY-FIRST, TWENTY-SECOND and TWENTY-THIRD of the complaint.

FURTHER ANSWERING THE COMPLAINT AND FOR A FIRST, AFFIRMATIVE DEFENSE THERETO, DEFENDANT RESPECTFULLY ALLEGES UPON INFORMATION AND BELIEF AS FOLLOWS:

SEVENTH: That plaintiff's employment had certain risks incidental thereto which were obvious and well known to plaintiff at all the times of said employment and also when plaintiff entered upon said employment and these risks were assumed by plaintiff; that whatever injuries plaintiff received in said employment and which are complained of by the plaintiff herein, arose from and were caused by said risks, all of which were taken and assumed by plaintiff at the time he entered upon said employment and during the continuance thereof.

Answer to Complaint

FURTHER ANSWERING THE COMPLAINT AND FOR A SECOND, AFFIRMATIVE DEFENSE THERETO, DEFENDANT RESPECTFULLY ALLEGES UPON INFORMATION AND BELIEF AS FOLLOWS:

EIGHTH: That if plaintiff suffered any injuries as referred to in the complaint, the same were caused or contributed to by the negligence of said plaintiff and/or his co-employees for whose negligence defendant is not liable.

WHEREFORE, defendant demands judgment dismissing the complaint of the plaintiff together with the costs and disbursements of this action.

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendant

By: J. WARD O'NEILL
A Member of the Firm
One State Street Plaza
New York, New York 10004

A-11

Interrogatories of Defendant

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

PURSUANT TO THE PROVISIONS OF RULE 33 OF THE FEDERAL RULES OF CIVIL PROCEDURE, THE FOLLOWING INTERROGATIONS ARE PROPOUNDED BY THE DEFENDANT TO BE ANSWERED BY PLAINTIFF IN WRITING AND UNDER OATH WITHIN THIRTY (30) DAYS FROM THE DATE OF SERVICE AND SAID INTERROGATORIES ARE DEEMED TO BE CONTINUING UP TO THE DATE OF TRIAL AND REQUIRE SUPPLEMENTARY ANSWERS IF PLAINTIFF OBTAINS FURTHER INFORMATION BETWEEN THE TIME ANSWERS ARE SECURED AND THE TIME OF TRIAL:

1. Give the names and addresses or, if the names are not known, a description sufficient for identification of any and all persons known to you or to your attorney to have been present at the time and place where you alleged you were injured.

2. Give the names and addresses or, if the names are not known, a description sufficient for identification, of any and all persons known to you or to your attorney to have knowledge of the accident referred to in the complaint.

3. Give the names and addresses or, if the names are not known, a description sufficient for purposes of identification of any and all persons from whom plaintiff, his

attorney, or anyone acting on his behalf, has obtained a statement concerning the matters alleged in the complaint, stating further which of these statements are oral or written, signed or unsigned, the present location of each such statement and the date each was obtained.

4. State in what respect or respects it is claimed that defendant, its agents, servants and/or employees were negligent and set forth by name or description sufficient for identification, each and every employee of defendant whom plaintiff claims was negligent.

5. State in what respect or respects it is claimed that the m/s Hoegh Opal was unseaworthy, describing:

(a) The parts of the vessel alleged to have been unseaworthy and

(b) The specific conditions alleged to constitute such unseaworthiness.

6. State the exact location on board the m/s Hoegh Opal of plaintiff at the time of his alleged injury.

7. State whether actual or constructive notice is claimed.

8. If actual notice is claimed, state what the condition was and when, where, to whom and by whom the notice was given, and what was said at the time.

9. If constructive notice is claimed, state for how long a time before plaintiff's accident the said condition is claimed to have existed.

Interrogatories of Defendant

10. If you claimed to have slipped or fallen, state what caused you to slip or fall; state and give a description of the article or articles on or from which you claimed to have slipped or fallen.

11. State the activity in which you were engaged at the time of the accident, as alleged in the complaint.

12. State where you were going at the time you claim you were injured.

13. Give the date and exact time of day you claim you were injured.

14. State at what time you commenced work aboard the m/s Hoegh Opal on the day of the alleged accident.

15. Describe each and every injury plaintiff claims to have sustained in the accident described in the complaint, indicating the nature and extent thereof and each and every part of the body affected.

16. Does plaintiff claim that the injuries referred to in his answer to the preceding interrogatory are permanent and, if so, indicate which conditions are claimed to be permanent.

17. State the period of time during which plaintiff claims, because of his injuries referred to in the complaint, he was

(a) disabled;

(b) confined to his bed;

(c) confined to his home; and

(d) prevented from working.

Interrogatories of Defendant

18. From whom, when and where did plaintiff receive medical or surgical treatment for the injuries referred to in the complaint.

19. List each and every doctor who has examined and/or treated plaintiff for the conditions alleged in the complaint.

20. Prior to the date of his alleged accident, had plaintiff ever received treatment to the parts of his body referred to in answer to interrogatory numbered "15".

21. If the answer to the preceding interrogatory is in the affirmative, state:

(a) the date of each and every treatment;

(b) the physician(s) and/or medical facilities where plaintiff received treatment for same;

(c) whether plaintiff received any money in connection with same in the way of compensation or settlement of a claim and

(d) if the answer to "(c)" above is in the affirmative, state when and from whom the money was received.

22. State whether you have ever been treated at a hospital and, if so, state when, where and for what.

23. State whether you have been treated by any doctor (other than a hospital doctor) during the past ten years and, if so, give the names and addresses of the doctors, the approximate dates of treatment and the illnesses or injuries for which you were treated.

Interrogatories of Defendant

24. State whether plaintiff has incurred any personal expenses in connection with the injury alleged in the complaint and, if so, indicate as to each item, the date paid, to whom and for what purpose and the amount.

25. State the amount plantiff claims to have lost as wages as a result of the injuries referred to in the complaint.

26. State the dates on which plaintiff claims to have been prevented from working as a result of the injuries referred to in the complaint.

27. State your date of birth, present residence address and social security number.

28. State the amount of plaintiff's income for the years:

(a) 1969

(b) 1970

(c) 1971

(d) 1972

(e) 1973

29. Have you ever served in the Armed Forces of the United States? If so, state:

(a) the dates of such service;

(b) the nature of your discharge;

(c) the branch of the service in which you served;

(d) your rank and organization;

(e) your service number.

Interrogatories of Defendant

30. Has plaintiff sustained any injury subsequent to the date of your alleged accident. If so, set forth:

(a) the date and time of day;

(b) the location;

(c) name and address of all witnesses;

(d) circumstances.

31. State whether you have ever filed a claim for personal injury or illness against any employer and, if so, state the name and address of the employer, the year, and the nature of the injury or illness.

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendant

By J. WARD O'NEILL
Member of the Firm
One State Street Plaza
New York, New York 10004

To:

KALMANSON & KLAPPER, ESQS.
Attorneys for Plaintiff
225 Broadway
New York, N. Y. 10007

Plaintiff's Answers to Interrogatories

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE, that the plaintiff answering the interrogatories propounded by the defendant, respectfully shows to this Court and alleges as follows:

1. At the time of this accident the only person present to the plaintiff's knowledge was Trunios Gusman, 469 East 143rd Street, Bronx, New York

2. Following persons had knowledge of the accident were Trunios Guzman, 469 East 143rd Street, Bronx, New York, also an individual known only to the plaintiff as "TOOTIE", address unknown & JULEOUS KATRILE, address unknown

3. Juleous Katrile, address unknown. Statement was obtained from the aforesaid individual on or about February 19, 1973 and said statement is not at this time in the possession of the plaintiff nor his attorneys.

4. That the said accident and the injuries resulting therefrom were caused solely through and by reason of the negligence and carelessness of the defendant in the ownership, operation, management, maintenance and control of the vessel aforesaid; in carelessly and negligently and knowingly and/or for a long and/or unreasonable length of time, causing and permitting the vessel aforesaid and in particular its deck, to become and to remain in a defective, dangerous, slippery, traplike

and unsafe condition, and to contain thereon, accumulations of foreign matter, and snow and ice; in carelessly and negligently and knowingly and/or for a long and/or unreasonable length of time, causing and permitting the deck of the aforedescribed vessel to become and to remain in a condition above described, at a time when the defendant, its agents, servants and/or employees knew or in the excess of reasonable care and caution could and should have known that the deck in its then condition could and was likely to and would result in injury to those lawfully making use thereof, including this plaintiff; in negligently and carelessly and knowingly and/or for a long and/or unreasonable length of time, failing and omitting to provide the plaintiff herein with a safe and proper place in which to work; in carelessly and negligently and knowingly and/or for a long and/or unreasonable length of time causing and permitting the deck aforesaid to become and to remain in the condition above described and for such a long period of time, so as to constitute the same in its then condition a menace and a nuisance; in carelessly and negligently and knowingly and/or a long and/or unreasonable leng h of time, causing and permitting the deck aforesaid to become and to remain in a defective and slippery condition; in causing and permitting improper and unskillful cleaning of the deck; in failing and omitting to warn or give notice to the plaintiff of the dangers and hazards existing thereat; and the defendant was otherwise reckless, careless and negligent in failing and omitting to take prompt, proper and suitable precautions for the plaintiff's safety.

5. It will be claimed that the M/S HOEGH OPAL was not seaworthy in that on the offshore side of the aforesaid vessel in and about Hatch #4 on the top deck,

said area had an accumulation of ice and snow and that the aforesaid ice and snow constituted an unseaworthy condition aboard the aforesaid ship.

6. This accident took place on the offshore side of the aforesaid vessel in and about Hatch #4 on the top deck, on the vessel aforesaid.

7/8. It will be claimed that the defendants herein, through their agents, servants and/or employees had actual notice of the condition which existed and caused this accident in that they had previously and prior to this accident and caused this accident in that they had previously and prior to this accident cleaned onshore side of Hatch #4 of snow and ice. It will be claimed that they had constructive notice in that the aforesaid condition existed for an unreasonable length of time prior to the happening of this accident.

9. See 7 & 8

10. The plaintiff herein was caused to slip and fall because of the presence of snow and ice at the aforesaid time and place of this occurrence.

11. At the time of this accident, the plaintiff herein was assisting in landing a draft at the place of the accident.

12. At the time of this accident, the plaintiff was pushing a draft over and along the top deck.

13. This accident took place on February 7, 1973 at approximately 8:45 a.m.

14. The plaintiff started work on the date of the accident at 8:00 a.m.

15. As a result of this accident, the plaintiff sustained the following personal injuries: Abrasions of the

back, sacroiliac sprain, hematoma of the left side of the back, lumbosacral strain.

16. It will be claimed that the aforesaid injuries are of a lasting and permanent nature and character.

17a. The plaintiff was disabled from the date of the accident to June 5, 1973.

bc. Plaintiff herein was confined to bed and home for the period of disability stated above except for theraputic excursions and fresh air and sunshine.

18/19. This plaintiff was treated at the Doctor's Hospital, Staten Island, New York, as well as Dr. Schwartz, 57 Broad Street, Staten Island, New York and Dr. Ritzman, 150 Remsen Street, Brooklyn, New York.

20, 21, 22, 23. Prior to the happening of the accident and approximately 12 years ago, this plaintiff had a pulled muscle in his back which required no hospitalization and at the present time the plaintiff can not recall the name and address of the physician who treated him. Plaintiff does not recall that he received approximately $475.00 in compensation.

In 1971, plaintiff was treated at the Norwegian Hospital in Brooklyn where he had an injury to his shoulder and neck. He does not recall the exact dates of his confinement.

24. Plaintiff claims he expended approximately $65.00 for cabs and bus fares to and from doctors offices and hospitals for treatment rendered to him following this accident.

25. Plaintiff claims that at time of this accident he was making $224.00 per week and that he was unable

to work for approximately ten weeks and his lost earnings are approximately $2464.00

26. Plaintiff was unable to work from the date of the accurrence to June 5, 1973.

27. Plaintiff was born on June 14, 1940 and presently resides at 705 59th Street, Brooklyn, New York. His social security number is 058 32 9052

28.

1969	8,000.00
1970	5,000.00
1971	8,500.00
1972	7,800.00
1973	9,500.00

29. No

30. No

31. See item 21.

Yours, etc.,

SCHNEIDER, KLEINICK WEITZ & KLAPPER
Attorneys for the Plaintiff
11 Park Place
New York, New York 10007

By: FLOYD KLAPPER

Dated: New York, New York
May 21, 1974

To:

HAIGHT, GARDNER, POOR & HAVENS, ESQS.
Attorneys for Defendant
One State Street Plaza
New York, New York 10004

Defendant's Notice of Motion

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE upon the annexed affidavit of Joseph T. Stearns, duly sworn to the 24th day of May, 1974, and upon the pleadings and all prior proceedings herein, the undersigned will move this Court before the Honorable John F. Dooling, Jr., to whom this case is assigned for all purposes at Courtroom 8 of the Federal Courthouse, 225 Cadman Plaza East, Brooklyn, New York, at 4:30 P.M. on June 26, 1974, or as soon thereafter as counsel can be heard for an order pursuant to Rule 19 FRCP ordering that Gulf Insurance Company, compensation insurer of Pittston Stevedoring Corporation, the employer of the plaintiff at the time mentioned in his complaint, join as a party plaintiff in this action; and, for leave pursuant to Rule 14 FRCP to implead said Pittston Stevedoring Corp. as third-party defendant in order to obtain a pro rata reduction of defendant's liability, if any, to plaintiff and for such other relief as may be just in the premises.

Yours, etc.,

HAIGHT, GARDNER, POOR & HAVENS
Attorney for Defendant

By (signed) J. WARD O'NEILL
A Member of the Firm
One State Street Plaza
New York, New York 10004

Dated: New York, New York,
May , 1974.

To:

SCHNEIDER, KLEINICK & WEITZ
Attorneys for Plaintiff
11 Park Place
New York, New York 10007

Supporting Affidavit of Joseph T. Stearns

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

JOSEPH T. STEARNS, first being duly sworn, deposes and says:

1. That he is an attorney associated with the firm of Haight, Gardner, Poor & Havens and is fully familiar with all prior proceedings had heretofore herein.

2. I submit this affidavit in support of defendant's motion pursuant to Rule FRCP for an order joining Gulf Insurance Company as a necessary party in this proceeding. The defendant also moves pursuant to Rule 14 FRCP for an order permitting it to implead Pittston Stevedoring Corp. as third-party defendant in order that defendant may assert a claim for pro rata reduction of plaintiff's verdict, if any, and for counsel fees and disbursements.

3. This is a longshoreman's personal injury action. Plaintiff claims to have been injured on the deck of the defendant's vessel, m/s Hoegh Opal, while at work near her No. 4 hatch. The accident occurred February 7, 1973 after the effective date of the 1972 Amendments to Longshoremen's and Harbor Worker's Compensation Act. Gulf Insurance Company is the compensation insurance carrier for plaintiff's employer, Pittston Steve-

doring Corporation. Plaintiff received benefits under the Act for temporary total disability in the amount of $736 and received as well the benefit of the insurer's expenditure of $377 for medical attention rendered to the plaintiff. Gulf Insurance Company claims an "indemnity lien" for the total amount of compensation benefits extended to plaintiff. A copy of the letter from Gulf Insurance Company to Shipowners Claims Bureau, defendant's insurance representative here in New York, stating the amount of the "lien" is annexed hereto as Exhibit "A.".

4. Defendant's motion is essentially based on defendant's contention that Gulf Insurance Company's claim for its "lien" to which it is subrogated for the employer by Section 33(h) of the Act [33 U.S.C. 33(h)] is a claim against the defendant and not a claim against whatever plaintiff may recover in this action by way of judgment or settlement. It follows from this interpretation that the employer's insurer's claim is subject to the shipowner's defense that contributing negligence of the stevedore caused plaintiff's accident, should it be ultimately found that plaintiff was injured in a manner and for reasons alleged by him. As a second aspect of this motion, defendant moves this Court to rule that under the 1972 Amendments, this plaintiff can recover only upon proof that his accident was caused by the *sole* negligence of the shipowner without the negligence of the stevedore—employer contributing thereto, which would moot the defendant's contentions made in that part of the motion made under Rule 19. In addition, the defendant asks the court to rule whether it should have leave under Rule 14 FRCP to implead

plaintiff's employer, Pittston Stevedoring Corporation in order to assert a right to a pro rata reduction of plaintiff's verdict upon proof of contributing negligence of the stevedore, as well as to claim counsel fees and expenses. The second aspect of this motion is made essentially because the arguments contained therein were recently presented to a specially convened non-statutory three judge court sitting in the Eastern District of Pennsylvania. Defendant's motion here, pursuant to Rule 19 was not made in the Philadelphia proceeding and the court there was not asked to join the employer or its insurer as a necessary party, and was not asked to rule whether the compensation payor's claim was properly asserted against allegedly negligent third party, shipowner, or is a right essentially against plaintiff to recover, pro tanto, compensation payments from the proceeds of suit. It is defendant's belief that its Rule 19 motion presents issues of first impression since the passage of the 1972 amendments to the Act. Defendant also contends that the issue here presented is vitally significant to shipowner's interests as well as to the shipping industry in the port of New York, long burdened with the inordinate expense of longshoremen's personal injury actions. The arguments in support of defendant's Rule 19 motion are presented, we hope, in full in the accompanying brief. To capsulize this argument, defendant states that *Federal Marine Terminals* v. *Burnside Shipping Co.*, 394 U.S. 404 (1972) preempts the field concerning the issues here relevant and that the holding of *Pope & Talbot* v. *Hawn*, 346 U.S. 406, 412 is overruled, and that the only way the courts can fully effectuate the purposes of the 1972 Amendments is to require the employer or its insurer to join

in the longshoreman's action as a party plaintiff, or lose its claim of entitlement to recoup its lien if the stevedore's contributing negligence is proven.

5. Here plaintiff claims negligence of the shipowner in causing or permitting the coninuance of an unsafe condition, which he apparently claims was ice and snow on deck in the work area. This allegation of negligence applies with at least equal fault to Pittston Stevedoring Corp., which began work at the hatch some 45 minutes before the alleged accident occurred.

(signed) JOSEPH T. STEARNS

Sworn to before me this
day of May, 1974.
Notary Public

Order of June 14, 1974

ORDER [endorsed on motion papers]

Plaintiff not opposing, it is

ORDERED that defendant have leave to add Gulf Insurance as a party under Rule 19(a) and to bring in Pittston Stevedoring as a third-party defendant.

(signed) JOHN F. DOOLING
U.S.D.J.

Complaint Under Rule 19(a)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

RONALD LANDON,

Plaintiff,

—against—

LIEF HOEGH AND CO., INC.,

Defendant.

A/S ARCADIA,

Defendant and "Plaintiff" Seeking Joinder,

—against—

GULF INSURANCE CO.,

Plaintiff or Defendant or Involuntary Plaintiff.

Defendant, A/S Arcadia, sued herein as Lief Hoegh and Co., Inc., by its attorneys, Haight, Gardner, Poor & Havens, hereby complains of plaintiff, defendant or involuntary plaintiff, Gulf Insurance Co., as follows:

1. Plaintiff is a citizen and resident of the State of New York.

2. Defendant is a foreign business entity organized and existing under and by virtue of the laws of the Kingdom of Norway and does not have its principal place of business within the State of New York.

3. Plaintiff or defendant or involuntary plaintiff, Gulf Insurance Co., is a corporation organized and existing under and by virtue of the laws of one of the states of the United States other than New York State, and does not have its principal place of business in New York State.

4. Plaintiff, a longshoreman allegedly employed by Pittston Stevedoring Corporation, brought suit in this Court to recover damages for personal injuries allegedly sustained by him on February 7, 1973 aboard m/s Hoegh Opal, a vessel owned and operated by defendant, while the vessel was afloat in the navigable waters of the United States at Pier 19, Staten Island, New York. A copy of plaintiff's complaint and answer of the defendant is annexed hereto.

5. At or prior to the time of the event complained of, Gulf Insurance Co. issued a policy of insurance covering Pittston Stevedoring Corp. insuring them against liability for claims for Workmen's Compensation under the Longshoremen's and Harbor Workers' Compensation Act, among other things.

6. That subsequent to the event complained of by plaintiff, he was paid compensation of $736 by Gulf Insurance Co., pursuant to the policy aforesaid, under and by virtue of the Longshoremen's and Harbor Workers' Compensation Act for the period from February 6, 1973 to June 5, 1973, and in addition received under said Act medical treatment which plaintiff, Ronald Landon, claims has a reasonable value of $377, a sum paid by Gulf Insurance Co., for said treatment, to third parties.

7. That by virtue of payment of compensation by Gulf Insurance Co. and by their payment of medical expenses

allegedly necessarily incurred by plaintiff, Ronald Landon, Gulf Insurance Co., pursuant to 33 USC A33(H), is subrogated to the rights of its insured, Pittston Stevedoring Corp., and may have a claim against defendant, A/S Arcadia, the owner of m/s Hoegh Opal, to recover $1,113, the sum of compensation paid and medical expenses incurred.

8. That in his complaint, plaintiff Ronald Landon, alleges that he sustained the injury for which said compensation was paid and medical expenses incurred as a result of the negligence of the defendant.

9. That if plaintiff, Ronald Landon, sustained any accidental injury aboard s/s Hoegh Opal on February 7, 1973 as he alleges, for which the defendant is liable, which defendant expressly denies, said injury was caused or brought about by the contributing negligence of plaintiff and other employees of Pittston Stevedoring Corp., for whose actions Pittston Stevedoring Corp. and Gulf Insurance Co. are responsible.

10. As a result of the foregoing and in the event defendant is adjudged liable to plaintiff, Ronald Landon, defendant will refuse to pay to Gulf Insurance Co. any portion of its claim for compensation paid in the medical expenses incurred.

11. That pursuant to Rule 19(a) and order of the Court dated June 14, 1974, Gulf Insurance Co. is joined as a necessary party in this action and may proceed as a plaintiff against defendant in order to prove its entitlement to recover compensation paid to plaintiff, Ronald Landon,

and the reasonable value of medical expenses incurred as a result of the injury claimed by him, but if Gulf Insurance Co. refuses to so proceed, it will be made a defendant or involuntary plaintiff as the Court may decide.

WHEREFORE, defendant demands judgment in the event that it is adjudged liable to plaintiff, Ronald Landon, extinguishing any claim of Gulf Insurance Co. against defendant in this action for the amount of compensation paid to plaintiff, Ronald Landon, or for the reasonable value of medical expenses incurred; or for any sum or sums which Gulf Insurance Co. may at any time in the future be held liable in compensation to plaintiff by any provision of the Longshoremen's and Harbor Workers' Compensation Act.

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendant and
"Plaintiff" Seeking Joinder

By (signed) J. WARD O'NEILL
A Member of the Firm
One State Street Plaza
New York, New York 10004

Counterclaim and Answer to Rule 19(a) Complaint

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

Gulf Insurance Co., Plaintiff, or Defendant, or Involuntary Plaintiff, by its attorneys, Di Costanzo, Klonsky & Cutrona, answering the third party complaint of A/S Arcadia, respectfully alleges upon information and belief as follows:

1st. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in the paragraphs of the third party complaint of A/S Arcadia marked or numbered "1" and "9".

2nd. Admits each and every allegation contained in the paragraphs of the third party complaint of A/S Arcadia marked or numbered "2", "3", "4", "5", "6", "7" and "8".

3rd. Denies each and every allegation contained in the paragraph of the third party complaint of A/S Arcadia marked or numbered "10".

AS AND FOR A FIRST AFFIRMATIVE DEFENSE GULF INSURANCE CO. FURTHER ALLEGES UPON INFORMATION AND BELIEF:

4th. That the third party complaint of A/S Arcadia fails to state a cause of action.

AS AND FOR A CLAIM BY GULF INSURANCE CO. AGAINST PLAINTIFF RONALD LANDON, DEFENDANT LIEF HOEGH AND CO., INC., AND A/S ARCADIA:

5th. As the compensation carrier for Pittston Stevedoring Corp., the employer of the plaintiff Ronald Landon,

Gulf Insurance Co. has paid $736.80 in workmen's compensation benefits, and has expended $377.00 by way of medical on behalf of the plaintiff, and asserts a lien in the total amount of $1,113.80.

AS AND FOR A COUNTERCLAIM AGAINST THE PLAINTIFF, GULF INSURANCE CO. FURTHER ALLEGES UPON INFORMATION AND BELIEF:

6th. That on the 3rd day of February, 1973, the plaintiff was a longshoreman in the employ of Pittston Stevedoring Corp., working aboard the M/S Hoegh Opal.

7th. That on said date, while the plaintiff was working aboard the said vessel as an employee of Pittston Stevedoring Corp., the plaintiff knew or should have known of all conditions prevailing in the area of the said vessel where he was at work.

8th. That while working aboard the said vessel on said date as an employee of Pittston Stevedoring Corp., the plaintiff had certain job duties, amongst which was the duty of performing the services by him to be performed in a safe, proper and workmanlike manner, and to so conduct himself in the performance of the services by him to be performed so as not to cast his employer, Pittston Stevedoring Corp., into liability with any third party, nor cast the compensation carrier of his employer, Gulf Insurance Co., into liability with any third party.

9th. That whatever injuries plaintiff sustained as alleged in the complaint, were caused or contributed to by his own negligence, and Gulf Insurance Co. pleads the negligence of the plaintiff as a bar in whole or in part, to the cause of action alleged in the complaint.

10th. That if Gulf Insurance Co. be adjudged liable herein to indemnify A/S Arcadia, such liability will have been brought about, caused or contributed to by the negligence and fault of the plaintiff herein by reason of the said plaintiff having failed to perform his work and job duties in a safe, proper and workmanlike manner, and by the active, affirmative, principal and primary fault of the plaintiff herein, and by the plaintiff's breach of both the express and implied terms of his contract of employment with Pittston Stevedoring Corp.

11th. That by reason of the foregoing, if Gulf Insurance Co. herein be adjudged liable to indemnify A/S Arcadia, the said Gulf Insurance Co. is entitled to recover its compensation lien from the plaintiff herein, together with the costs and disbursements of this action, including a reasonable amount for attorneys' fees.

AS AND FOR A COUNTERCLAIM AGAINST A/S ARCADIA HEREIN, GULF INSURANCE CO. FURTHER ALLEGES UPON INFORMATION AND BELIEF:

12th. That if Gulf Insurance Co. be adjudged liable herein to A/S Arcadia, such liability being expressly denied, such liability will have been brought about and caused in whole or in part, by the active and affirmative negligence and fault of A/S Arcadia, and by the breach by said A/S Arcadia of both the express and implied terms of its contract with plaintiff's employer, Pittston Stevedoring Corp., and also by the breach by A/S Arcadia of the warranty of seaworthiness which it owed to plaintiff's employer; and that by reason of the foregoing, the said A/S Arcadia is obligated to indemnify the Gulf Insurance Co. for an amount equal to its compensation lien, together with the costs and disbursements of this action, including a reasonable amount for counsel fees.

WHEREFORE, the Gulf Insurance Co. demands judgment dismissing the third party complaint of A/S Arcadia. together with the costs, disbursements of this action, and the legal fees and expenses incurred by it in defense of this action; or in the event that plaintiff Ronald Landon recover from the defendant Lief Hoegh and Co., Inc. and/or A/S Arcadia, then Gulf Insurance Co. demands judgment for the full amount of its compensation lien in the sum of One Thousand One Hundred Thirteen and 80/100 ($1,113.80) Dollars, together with expenses and legal fees, and the costs and disbursements of this action.

DI COSTANZO, KLONSKY & CUTRONA,

By (signed)
Member of the Firm,
Attorneys for Gulf Insurance Co.,
Plaintiff or Defendant or
Involuntary Plaintiff,
Office & P.O. Address,
Sixty-Six Court Street,
Borough of Brooklyn,
City of New York 11201.

To:

HAIGHT, GARDNER, POOR & HAVENS, ESQS.,
Attorneys for Defendant and
"Plaintiff" Seeking Joinder,
One State Street Plaza,
New York, N.Y. 10004.

KALMANSON & KLAPPER, ESQS.,
Attorneys for Plaintiff,
11 Park Place,
New York, N.Y. 10007.

Gulf's Answer to Plaintiff's Complaint

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

GULF INSURANCE Co., Plaintiff, or Defendant, or Involuntary Plaintiff, by its attorneys, Di Costanzo, Klonsky & Cutrona, answering the complaint of the plaintiff, respectfully alleges upon information and belief as follows:-

1st. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in the paragraphs of the complaint marked or numbered "first", "second", "third", "fourth", "fifth", "sixth", "seventh", "ninth", "tenth", "eleventh", "twelfth", "eighteenth", "nineteenth", "twentieth", "twenty-first", and "twenty-second".

2nd. Admits each and every allegation contained in the paragraphs of the complaint marked or numbered "eighth", "thirteenth", "fourteenth", "fifteenth", "sixteenth", and "seventeenth".

3rd. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in the paragraph of the complaint marked or numbered "twenty-third".

AS AND FOR A FIRST AFFIRMATIVE DEFENSE GULF INSURANCE CO. FURTHER ALLEGES UPON INFORMATION AND BELIEF:

4th. The complaint of the plaintiff Ronald Landon fails to state a cause of action.

Gulf's Answer to Plaintiff's Complaint

AS AND FOR A CLAIM BY GULF INSURANCE CO. AGAINST PLAINTIFF RONALD LANDON, DEFENDANT LIEF HOEGH AND CO., INC., AND A/S ARCADIA:

5th. As the compensation carrier for Pittston Stevedoring Corp., the employer of the plaintiff Ronald Landon, Gulf Insurance Co. has paid $736.80 in workmen's compensation benefits, and has expended $377.00 by way of medical on behalf of the plaintiff, and asserts a lien in the total amount of $1,113.80.

AS AND FOR A COUNTERCLAIM AGAINST THE PLAINTIFF, GULF INSURANCE CO. FURTHER ALLEGES UPON INFORMATION AND BELIEF:

6th. That on the 3rd day of February, 1973, the plaintiff, Ronald Landon, was a longshoreman in the employ of Pittston Stevedoring Corp., working aboard the M/S Hoegh Opal.

7th. That on said date, while the plaintiff was working aboard the said vessel as an employee of Pittston Stevedoring Corp., the plaintiff knew or should have known of all conditions prevailing in the area of the said vessel where he was at work.

8th. That while working aboard the said vessel on said date as an employee of Pittston Stevedoring Corp., the plaintiff had certain job duties, amongst which was the duty of performing the services by him to be performed in a safe, proper and workmanlike manner, and to so conduct himself in the performance of the services by him to be performed so as not to cast his employer, Pittston Stevedoring Corp., into liability with any third party, nor cast the compensation carrier of his employer, Gulf Insurance Co., into liability with any third party.

9th. That whatever injuries plaintiff sustained as alleged in the complaint, were caused or contributed to by his

own negligence, and Gulf Insurance Co. pleads the negligence of the plaintiff as a bar in whole or in part, to the cause of action alleged in the complaint.

10th. That if Gulf Insurance Co. be adjudged liable herein to indemnify A/S Arcadia, such liability will have been brought about, caused or contributed to by the negligence and fault of the plaintiff herein by reason of the said plaintiff having failed to perform his work and job duties in a safe, proper and workmanlike manner, and by the active, affirmative, principal and primary fault of the plaintiff herein, and by the plaintiff's breach of both the express and implied terms of his contract of employment with Pittston Stevedoring Corp.

11th. That by reason of the foregoing, if Gulf Insurance Co. herein be adjudged liable to indemnify A/S Arcadia, the said Gulf Insurance Co. is entitled to recover its compensation lien from the plaintiff herein, together with the costs and disbursements of this action, including a reasonable amount for attorneys' fees.

AS AND FOR A COUNTERCLAIM AGAINST A/S ARCADIA HEREIN, GULF INSURANCE CO. FURTHER ALLEGES UPON INFORMATION AND BELIEF:

12th. That if Gulf Insurance Co. be adjudged liable herein to A/S Arcadia, such liability being expressly denied, such liability will have been brought about and caused in whole or in part, by the active and affirmative negligence and fault of A/S Arcadia, and by the breach by said A/S Arcadia of both the express and implied terms of its contract with plaintiff's employer, Pittston Stevedoring Corp., and also by the breach by A/S Arcadia of the warranty of seaworthiness which it owed to plaintiff's employer; and that by reason of the foregoing, the said A/S Arcadia is obligated to indemnify the Gulf Insurance Co. for an amount

equal to its compensation lien, together with the costs and disbursements of this action, including a reasonable amount for counsel fees.

WHEREFORE, the Gulf Insurance Co. demands judgment dismissing the complaint of the plaintiff, Ronald Landon, together with the costs and disbursements of this action, and the legal fees and expenses incurred by it in defense of this action; or in the event that A/S Arcadia be adjudged liable to plaintiff Ronald Landon, the Gulf Insurance Co. demands judgment over and against the plaintiff, Ronald Landon, the defendant Lief Hoegh and Co., Inc. and/or A/S Arcadia, or any of them, for the full amount of its compensation lien in the sum of One Thousand One Hundred Thirteen and 80/100 ($1,113.80) Dollars, together with expenses and legal fees, and the costs and disbursements of this action.

DI COSTANZO, KLONSKY & CUTRONA,

By (signed)
Member of the Firm,
Attorneys for Gulf Insurance Co.,
Plaintiff or Defendant or
Involuntary Plaintiff,
Office & P.O. Address,
Sixty-Six Court Street,
Borough of Brooklyn,
City of New York 11201.

To:

KALMANSON & KLAPPER, ESQS.,
Attorneys for Plaintiff,
11 Park Place,
New York, N.Y. 10007.

HAIGHT, GARDNER, POOR & HAVENS, ESQS.,
Attorneys for Defendant and
"Plaintiff" Seeking Joinder,
One State Street Plaza,
New York, N.Y. 10004.

Gulf's Notice of Deposition of Plaintiff and of A/S Arcadia

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE, that Gulf Insurance Co., by its attorneys, will take the deposition upon oral examination of the plaintiff, pursuant to the Federal Rules of Civil Procedure, before a Notary Public, or before some other authorized officer, at the 28th Floor, No. 66 Court Street, in the Borough of Brooklyn, City and State of New York, on the 30th day of August, 1974, at 10:30 o'clock A.M., or on a lawfully adjourned day, and from day to day thereafter until the examination is completed.

PLEASE TAKE FURTHER NOTICE, that Gulf Insurance Co., by its attorneys, will take the deposition of A/S Arcadia by the person who was the Chief Officer aboard the M/S Hoegh Opal on February 7th, 1973, or any other person familiar with the facts herein, pursuant to the Federal Rules of Civil Procedure, before a Notary Public, or before some other authorized officer, at the 28th Floor, No. 66 Court Street, in the Borough of Brooklyn, City and State of New York, on the 30th day of August, 1974, at 11:30 o'clock A.M., or on a lawfully adjourned day, and

from day to day thereafter until the examination is completed.

Yours, etc.,

DI COSTANZO, KLONSKY & CUTRONA,

By (signed)
Member of the Firm,
Attorneys for Gulf Insurance Co.,
Plaintiff or Defendant or
Involuntary Plaintiff,
Office & P.O. Address,
Sixty-Six Court Street,
Borough of Brooklyn,
City of New York 11201.

Dated, Brooklyn, New York,
August 2nd, 1974.

To:

KALMANSON & KLAPPER, ESQS.,
Attorneys Plaintiff,
11 Park Place,
New York, N.Y. 10007.

HAIGHT, GARDNER, POOR & HAVENS, ESQS.,
Attorneys for Defendant and
"Plaintiff" Seeking Joinder,
One State Street Plaza,
New York, N.Y. 10004.

Motion of A/S Arcadia

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Joseph T. Stearns, as well as the pleadings and all prior proceedings had herein, the undersigned will move this Court before the Honorable John Dooling, Jr. to whom this case is assigned for all purposes at the Federal Courthouse, Courtroom 8, 225 Cadman Plaza East, Brooklyn, New York on the 9th day of September, 1974 at 10 o'clock in the forenoon of that day or as soon thereafter as counsel may be heard for an order pursuant to Rule 12(f) FRCP, striking the affirmative defense of Gulf Insurance Co. contained in paragraph "4th" of what is denominated the answer of said party to the third party complaint, which alleges that the complaint against it does not state a cause of action on its behalf; and pursuant to Rule 12(c), and for such other or further relief as may be just in the premises.

Yours, etc.,

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendant and
"Plaintiff" seeking Joinder,
A/S Arcadia

By (signed) J. WARD O'NEILL
A Member of the Firm
One State Street Plaza
New York, New York 10004

Dated: Brooklyn, New York
August , 1974

Motion of A/S Arcadia

To:

DiCostanzo, Klonsky & Cutrona, Esqs.
Attorneys for Plaintiff or Defendant
or Involuntary Plaintiff,
Gulf Insurance Co.
66 Court Street
Brooklyn, New York 11201

Schneider, Kleinick, Weitz & Klapper, Esqs.
Attorneys for Plaintiff
11 Park Place
New York, New York 10007

Supporting Affidavit of Joseph T. Stearns

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

1. I am an attorney-at-law associated with Haight, Gardner, Poor & Havens, attorneys for defendant. I submit this affidavit in support of defendant's motion pursuant to Rule 12(f) FRCP for an order striking the affirmative defense of the joined party, Gulf Insurance Co., contained in paragraph "4th" of what it denominates the "answer to the third party complaint", that the "complaint" joining it as a plaintiff or defendant or involuntary plaintiff fails to state a cause of action. The complaint, of course, does not state a cause of action on behalf of the defendant against the joined party, but to the contrary, asserts a cause of action on its behalf against the defendant, the moving party here. It is clear that the joined party has alleged that since plaintiff has sued there is no independent cause of action on its behalf, no basis for the "complaint", and no basis for its joinder.

2. Gulf Insurance Co. also asserts its "lien" against both plaintiff and defendant in paragraph "5th" of its answer. Defendant contends that the joined party has no "lien" on any recovery to which plaintiff may be found entitled, but has a *claim,* a *cause of action* against the shipowner to recover damages—the amount of its exposure in

compensation by way of payments for disability, medical expenses or any other benefits to which plaintiff may be entitled. Defendant-shipowner also contends that the joined party must assert this right in this suit since its claim to recover compensation payments is subject to defeat by proof of concurring negligence on the part of any employee of Pittston Stevedoring Corporation, Gulf Insurance Co.'s insured under the Longshoremen's and Harbor Workers' Compensation Act. For what appear to be strategic reasons, the joined party has not moved to dismiss the "complaint" against it.

3. This is what we believe to be a matter of first impression under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act. Defendant-shipowner contends that because of the presumptive concurring negligence of Pittston in causing plaintiff's alleged accident, it may properly refuse to pay the joined party any part of the compensation liability incurred, and defendant would, therefore, be subject to suit in a subsequent proceeding. Rule 19 FRCP provides, therefore, a proper means to join Gulf Insurance Co. so that the rights and obligations of the three interested parties may be resolved in this one suit.

4. In brief, if the joined party's interest in this proceeding is a cause of action to recover compensation payments on either tort or equitable principles, this cause of action is subject to defeat by proof of concurring negligence by Pittston Stevedoring Corp., and the "complaint" joining Gulf states a cause of action *on its behalf*. The joined party's affirmative defense alleging to the contrary should, therefore, be striken. Additionally, if Gulf Insurance Co. has a

cause of action against the shipowner-defendant, it has no claim against the plaintiff to recover such compensation payments and Gulf Insurance Co.'s counterclaim against the plaintiff is also improperly alleged in its answer. If, however, Gulf Insurance Co. has an interest only in the proceeds recovered by plaintiff, then the "complaint" *does not* state a cause of action on its behalf and the motion to strike should be denied and the "complaint" dismissed. However, as we believe is fully demonstrated in our brief in support of the motion, the law is clear that Gulf Insurance Co. has a cause of action to recover the amount of compensation paid against the shipowner *only*, and the affirmative defense alleging to the contrary should be striken.

(signed) JOSEPH T. STEARNS

Sworn to before me this
22nd day of August, 1974.

(SEAL)

GEORGE J. BIERNESSER
Notary Public, State of New York
No. 31-5316775
Qualified in New York County
Commission Expires March 30, 1976

A/S Arcadia's Reply to Counterclaim

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

Defendant and "Plaintiff" seeking joinder, A/S Arcadia, sued herein as Lief Hoegh and Co., Inc., by its attorneys, Haight, Gardner, Poor & Havens, replying to the claim and counterclaim of Gulf Insurance Co. asserted in the "Answer to the Third Party Complaint", states on information and belief as follows:

ANSWERING GULF INSURANCE CO.'S CLAIM

FIRST: Plaintiff's "claim" asserting a lien, expressed in paragraph 5th, fails to state a cause of action for which relief can be granted.

ANSWERING GULF INSURANCE CO.'S COUNTERCLAIM

SECOND: Denies each and every allegation contained in paragraph 12th.

FURTHER ANSWERING THE COUNTERCLAIM OF GULF INSURANCE CO., AND AS AND FOR A FIRST, PARTIAL AFFIRMATIVE DEFENSE THERETO, A/S ARCADIA ALLEGES:

THIRD: Gulf Insurance Co.'s counterclaim fails to state a cause of action against it insofar as the counterclaim is based on the express or implied terms of the contract between A/S Arcadia and Pittston Stevedoring Corp., or on any claimed warranty of the seaworthiness of m/s Hoegh Opal.

A/S Arcadia's Reply to Counterclaim

FURTHER ANSWERING THE COUNTERCLAIM OF GULF INSURANCE CO., AND AS AND FOR A SECOND, COMPLETE AFFIRMATIVE DEFENSE THERETO, A/S ARCADIA ALLEGES:

FOURTH: That if plaintiff's alleged injuries were caused or brought about in the manner and for the reasons he alleges, said injuries were caused in whole or in part by the negligence of plaintiff and/or other employees of Pittston Stevedoring Corp., for which Gulf Insurance Co. is responsible, and which bars this counterclaim.

WHEREFORE, defendant and "plaintiff" seeking joinder, A/S Arcadia, demands judgment dismissing the claim and counterclaim against it, and for such other or further relief as may be just in the premises.

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendant and
"Plaintiff" Seeking Joinder

By (signed) J. WARD O'NEILL
A Member of the Firm
One State Street Plaza

To:

DICOSTANZO, KLONSKY & CUTRONA, ESQS.
Attorneys for Plaintiff or Defendant
or Involuntary Plaintiff
Gulf Insurance Co.
66 Court Street
Brooklyn, New York 11201

SCHNEIDER, KLEINICK, WEITZ & KLAPPER, ESQS.
Attorneys for Plaintiff
11 Park Place
New York, N.Y. 10007

Gulf's Motion to Dismiss

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of Philip F. Di Costanzo, Esq., duly sworn to the 18th day of September, 1974, as well as pleadings and all prior proceedings had herein, the undersigned will move this Court before the Honorable John Dooling, Jr., to whom this case is assigned for all purposes, at the Federal Courthouse, Courtroom No. 8, No. 225 Cadman Plaza East, in the Borough of Brooklyn, County of Kings, City and State of New York, on the 25th day of September, 1974, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order pursuant to Rule 12(b)(6), Rule 56, and Rule 12(c), Federal Rules of Civil Procedure, on the ground that the complaint of the defendant A/S Arcadia against Gulf Insurance Company fails to state a claim upon which relief can be granted, and for

such other and further relief as to this Court may seem just and proper.

Yours, etc.,

DI COSTANZO, KLONSKY & CUTRONA,

By (signed)
Member of the Firm,
Attorneys for Plaintiff or
Defendant or Involuntary
Plaintiff,
Office & P.O. Address,
Sixty-Six Court Street,
Borough of Brooklyn,
City of New York 11201.

Dated, Brooklyn, New York,
September 16th, 1974.

To:

HAIGHT, GARDNER, POOR & HAVENS, ESQS.,
Attorneys for Defendant and
"Plaintiff Seeking Joinder",
One State Street Plaza,
New York, N.Y. 10004.

SCHNEIDER, KLENICK, WEITZ & KLAPPER, ESQ.,
Attorneys for Plaintiff,
11 Park Place,
New York, N.Y. 10007.

Affidavit in Support of Motion to Dismiss

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK
CITY OF NEW YORK } ss.:
COUNTY OF KINGS

PHILIP F. DI COSTANZO, being duly sworn, deposes and says:

1. That he is an attorney-at-law and member of the firm of DiCostanzo, Klonsky & Cutrona, attorneys for the involuntary plaintiff, Gulf Insurance Company, and submits this affidavit in support of the motion as Gulf Insurance Company for an order dismissing the complaint of A/S Arcadia, defendant, against Gulf Insurance Company as plaintiff or defendant or involuntary plaintiff.

2. The original action of Ronald Landon, plaintiff, against Lief Hoegh and Co., Inc., is the typical third party action by a longshoreman against the vessel, seeking damages for personal injuries sustained by the longshoreman by reason of the negligence and carelessness of the shipowner, based solely on the theory of negligence, the accident having occurred on February 7th, 1973, subsequent to the amendments of the Longshoremen's and Harbor Workers' Compensation Act, Section 5(b), immunizing the employer from any third party liability.

3. This action was instituted by the filing of a complaint by the plaintiff's attorneys and served upon the de-

fendant Lief Hoegh and Co., Inc., and issue joined by the service of an answer by the defendant and the issuance of a complaint under Rule 19(a), joining a party as plaintiff or defendant or involuntary plaintiff. We respectfully submit that in the instant case the defendant A/S Arcadia has absolutely no cause of action against Gulf Insurance Company, and that Gulf Insurance Company is not a person needed for just adjudication under Rule 19.

4. Rule 19 deals with compulsory joinder of parties and parties whose presence before the Court is conditionally necessary or indispensable. If both the necessary and indispensable party have such a relationship to the action they should be joined when it is feasible.

5. The only claim that Gulf Insurance Company and its assured, Pittston Stevedoring Corp. have herein is that of a lien for compensation benefits paid to the plaintiff and for medical expended on his behalf.

6. There is no doubt that the employer, Pittston Stevedoring Corp., through its insurer, Gulf Insurance Company, has a lien against any recovery had by the plaintiff, and the Court have interpreted Section 33 of the Longshoremen's and Harbor Workers' Compensation Act, subdivision (e) as applicable to a third party action instituted by a longshoreman, and it provides:

> "(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:
>
> (1) The employer shall retain an amount equal to—
>
> * * *

"(B) the cost of all benefits actually furnished by him to the employee under section 7;

"(C) all amounts paid as compensation:".

7. That although the Compensation Act does not specifically spell out a provision for a lien on behalf of the employer in a third party action, the cases have held that the employer-carrier has the right to recoup compensation paid results from the equitable doctrine of subrogation. *The Etna,* 138 F. 2d 37 (Third Circuit 1943); *Fontana* v. *Pennsylvania Railroad Co.,* 106 F. Supp. 461, at 462 (D.C. S.D.N.Y. 1952), affirmed 205 F. 2d 151 cert. den.; *Ruggiero* v. *Rederiat,* 308 F. Supp. 708, 800 (D.C. S.D.N.Y. 1970), and the Courts have held that the right of the employer-carrier has been held to be not against the third party defendant but against the proceeds of an employee's suit, *Liberty Mutual Insurance Co.* v. *U.S.,* 290 F. 2d 257 (Second Circuit 1961); *Joyner* v. *F. & B. Enterprises, Inc.,* 448 F. 2d 1185 (U.S.C.A. D.C. 1971).

8. Deponent feels that the defendant will rely strongly on *Federal Marine Terminals Inc.* v. *Burnside Shipping Co.,* 394 U.S. 404, 88 S. Ct. Rep. 1144, at page 1149 says:

"The Court of Appeals was clearly mistaken in its assertion that the statutory method provides that the stevedoring contractor can sue only as a subrogee. Nothing on the face of Sec. 33 of the Act purports to limit the employer's remedy against third persons to subrogation to the rights of the deceased employee's representative. The provision of Sec. 33 that the employer's payment of compensation 'shall operate as an assignment to the employer of all right of the legal representa-

tive of the deceased * * * to recover damages against such persons' contains no words of limitation. Congress thereby gave the employer in return for his absolute liability to the employee's representative, part of the latter's rights against others."

WHEREFORE, it is respectfully requested that the instant motion be granted and the complaint of the defendant A/S Arcadia against Gulf Insurance Company, as plaintiff or defendant or involuntary plaintiff be dismissed as a matter of law.

PHILIP F. DICOSTANZO

Sworn to before me this
18th day of September, 1974.

GRACE J. ELMER
Notary Public, State of New York
No. 24-6178800
Qualified in Kings County
Commission Expires March 30, 1976

Memorandum and Order

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

RONALD LANDON, *Plaintiff,*

—against—

LIEF HOEGH AND CO., INC., *Defendant.*

A/S ARCADIA,
Defendant and "Plaintiff Seeking Joinder,"

—against—

GULF INSURANCE COMPANY,
Plaintiff or Defendant or Involuntary Plaintiff.

Appearances:

JOSEPH C. STEARNS, Esq. (Messrs. HAIGHT, GARDNER, POOR & HAVENS and J. WARD O'NEILL, of Counsel) for the shipowner

PHILIP DI COSTANZO, Esq. (Messrs. DI COSTANZO, KLONSKY & CUTRONA, of Counsel) for the stevedore's carrier

FLOYD F. KLAPPER, Esq. (Messrs. SCHNEIDER, KLEINICK, WEITZ & KLAPPER, of Counsel) for the Plaintiff

DOOLING, D. J.

In this action, commenced on August 16, 1973, plaintiff longshoreman, an employee of Pittston Stevedoring Corp.,

while aboard the vessel Hoegh Opel on February 7, 1973, through the alleged negligence of the defendant bareboat charterer in allowing snow and ice to accumulate on the top deck, sustained personal injuries when he slipped and fell; he seeks to recover damages against the defendant shipowner. Defendant denies that it was negligent and alleges that plaintiff's own negligence caused or contributed to his injury. Plaintiff's answer to defendants' interrogatory asserted unseaworthiness in the accumulation of ice and snow on the offshore side of the No. 4 hatch, top deck, where the accident allegedly occurred.

Defendant sought and obtained leave to join Gulf Insurance Company as a necessary party and also to join Pittston as a third party defendant against whom it could claim a pro rata reduction of any liability to plaintiff. Gulf was Pittston's Longshoremen's and Harbor Workers' Compensation Act carrier and it had alleged made $736 of disability payments to plaintiff and paid medical expenses of $377, pursuant to the Act, by reason of the injury sued upon, and it had by notice claimed a lien—an "indemnity lien"—in that amount. The theory of the motion, as to Gulf, was that the "indemnity lien" of Gulf under 33 U.S.C. § 933(b)(h), (which subrogates the carrier (Gulf) to the employer's (Pittston's) rights under 33 U.S.C. § 933(b), (d), (e), (f) and (g), which define the employer's and hence the carrier's right to be made whole out of a longshoreman's third party cause of action for medical benefit paid for and compensation payments made to the longshoreman) is in law a statutory claim directly against the third-party wrongdoer (defendant) and is not simply a "lien." A claimed consequence is that the stevedore's (Pittston's) contributing negligence should be a defense (or base for liability apportionment) to a third party sued by a long-

shoreman. Gulf takes the position that the stevedore, although it has Section 933 rights by "assignment" to which its carrier is subrogated, cannot be sued under the Act as amended effective October 27, 1972, because new Section 905(b) explicitly and purposefully so provides.

The long-familiar scheme of the Act is to grant the longshoreman wage compensation (Section 908) and medical benefits (Section 907) for injuries sustained on the job without proof of employer fault (Section 904), to make the employer's liability under the Act exclusive of all other liability to the employee (Section 905) and the employee's exclusive remedy for the negligence or wrong of his fellow employees (Section 933(i)). However, the employee retains the right to sue any third person liable to him in damages for the same injury. If the employe has accepted compensation "under an award in a compensation order," that operates to assign the employee's right to recover damages from a third-party wrongdoer unless the employee sues the third party within six months after the award. The employer (or his subrogated carrier) retains out of the recovery the expense of suit, the amount of medical benefit expended, the compensation paid, and the present value of future compensation and benefits and pays the balance to the employee. If the employee sues, the employer is liable for compensation and benefit only to the extent that the amount of it exceeds the third-party recovery. It will be seen from this that "lien" is simply a shorthand and approximate expression, and is not an exact legal description of the employer's interest in the third party action.

Before the 1972 changes the third party tort-feasor, typically the shipowner, could claim over against an employer whose fault rendered him liable to the shipowner for the shipowner's being mulcted in damages by the employee. *Ryan Stevedoring Co.* v. *Pan Atlantic S.S. Corp.*,

1956, 350 U.S. 124. Earlier, *Pope & Talbot, Inc.* v. *Hawn,* 1953, 346 U.S. 406, had made it clear that the shipowner was liable for the whole damage without reduction for compensation payments made by the employer, and still earlier *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.,* 1952, 342 U.S. 282, had held that where shipowner and employer were in concurrent fault, the whole damage recovered by the employee against the shipowner could not be apportioned between shipowner and employer under any doctrine of contribution. A later-developed corollary of *Ryan* was that certain kinds of breaches of duty owed by shipowner to stevedore could preclude the shipowner from successfully claiming-over against the stevedore. *Weyerhauser S.S. Co.* v. *Nacirema Operating Co.,* 1958, 355 U.S. 563, 567. More recently *Federal Marine Terminals* v. *Burnside Shipping Co.,* 1969, 394 U.S. 404, declined to hold the employer was limited to his rights under Section 933. There the third party recovery for wrongful death because of a statutory ceiling would inevitably be smaller than the compensation payments. The employer, the Court held, could claim against the ship for the whole of the compensation payments if it showed that the ship had breached a duty owed to it. Most recently *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.,* 1974, 94 S.Ct. 2174, has held that where the shipowner impleads a third party wrongdoer other than the employee, and who could, therefore, have been sued by the employer, contribution will be enforced (where complete indemnity is not available)—without renouncing the rule of *Halcyon* where the impleaded party is the employer and Section 933 is operative.

The plexus of relations among shipowner, longshoreman (or other harbor worker), employer of longshoreman and third party tort-feasor acting concurrently with shipowner and (i) being the longshoreman's employer and hav-

ing or not having breached a duty owed to the shipowner and (ii) being a non-employer concurrent tort-feasor having or not having breached a duty to the shipowner, that plexus of relations is reaching maturity of definition in the cases. The question here is, how much of it is swept away by the 1972 enactment of Section 905(b) as between shipowner and stevedore-employer of the injured longshoreman who has sued the shipowner alleging his negligence, denying his own, and asserting (although not relying on) the fact that the unsafe condition complained was also a condition of unseaworthiness?

Section 905(b) now provides

> "In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other

remedies against the vessel except remedies available under this chapter."

Analysis is helped if Section 933 is treated as (a) requiring the precise *Pope & Talbot* result, *i.e.*, that the compensation award does not reduce the damages recoverable against the third party wrongdoer; (b) definitely not depriving the employer-wrongdoer of any rights of suit he has against the third-party wrongdoer to recover for his own damage (including his liability to the longshoreman under the Act); (c) not itself the source of the wrong-doing employer's rights of action against the third-party wrongdoer, since those rights rest on subrogation and the whole range of legal duties that a shipowner may owe to a business visitor and its employees; and (d) really a time—regulatory mechanism determining the time during which the longshoreman must be accorded the prior and exclusive right to initiate suit based on the third-party tort (not on any tort committed against the stevedore or breach of contract duty committed against the stevedore by the shipowner). The shipowner's claimover against the stevedore or other third-party wrongdoer for indemnity or contribution is separate, normally a Rule 14 claim that, in pure indemnity law apart from Rule 14, is not ripe for suit until after the shipowner is cast in judgment and has paid it.

Was Section 905(b) meant, in exchange for abolishing the unseaworthiness ground of liability, to abolish every sort of right to pass on some or all of the shipowner's liabliity to the longshoreman to the employer? Even if that meant that a trivial, but legally sufficient, amount of negligence toward the longshoreman would enable the employer to off-load to the shipowner his entire liability under the Act even though the employer's negligence was the most significant proximate cause of the accident, and the em-

ployer was in breach of duties that he owed to the shipowner in respect of the accident and damage?

The language of Section 905(b) leaves no room for escape from the conclusion that the section means exactly that sweeping and painful result. The examination of the background and history of the legislative change in *Lucas* v. *"Brinknes" GES. Franz Lange G.m.b.h. & Co., K.G.* E.D.Pa. August 5, 1974, confirms the conclusion. Since the constitutional power of Congress to effect so sweeping a change is neither challenged nor conceded, it must not be considered at this time

Since these considerations altogether dispose of Gulf's interest, the interests of justice require that it now receive its dismissal from the action.

It is, accordingly,

ORDERED that the motion of defendant and plaintiff seeking joinder to strike the affirmative defense of the plaintiff, defendant, or involuntary plaintiff Gulf Insurance Co. is denied and the motion of said plaintiff, defendant, and ivoluntary plaintiff to strike or dismiss the complaint bringing it into the case is granted; and it is further

ORDERED that the Clerk is expressly directed now to enter judgment that defendant "plaintiff" seeking joinder A/S Arcadia, sued as Lief Hoegh and Co., Inc. take nothing as against plaintiff or defendant or involuntary plaintiff Gulf Insurance Company and that complaint—over under Rule 19(a) and the claims therein set forth are dismissed.

JOHN J. DOOLING,
JOHN D. DOOLING,
U. S. D. J.

Brooklyn, New York
October 10, 1974

Judgment

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

A memorandum and order of Honorable John F. Dooling, Jr., United States District Judge, having been filed on October 11, 1974, denying the motion of defendant and plaintiff seeking joinder, to strike the affirmative defense of the plaintiff, defendant, or involuntary plaintiff, to strike or dismiss the complaint bringing it into the case, and directing the Clerk to enter judgment, it is

ORDERED and ADJUDGED that defendant "plaintiff" seeking joinder A/S Arcadia, sued as Lief Hoegh and Co., Inc. take nothing as against plaintiff or defendant or involuntary plaintiff Gulf Insurance Company and that complaint—over under Rule 19(a) and the claims there in set forth are dismissed.

Dated: Brooklyn, New York
October 23, 1974

[Signed] LEWIS ORGEL
Clerk